

STATE OF MICHIGAN
COURT OF APPEALS

BENJAMIN KLEIMAN,

Plaintiff-Appellant/Cross-Appellee,

v

RAYMOND B. JOHNSON, JOHNSON'S
MANAGEMENT SERVICES COMPANY, INC.,
and DANIEL J. YEOMANS,

Defendants-Appellees/Cross-
Appellants.

UNPUBLISHED

June 30, 2000

No. 219117

Kent Circuit Court

LC No. 97-012113-CZ

Before: Smolenski, P.J., and Zahra and Collins, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition for defendants and dismissing plaintiff's claims of fraudulent misrepresentation, innocent misrepresentation, silent fraud, promissory estoppel, and breach of fiduciary duty. We affirm.

We review de novo a motion for summary disposition under MCR 2.116(C)(10). *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999).

A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. In ruling on such a motion, a trial court must consider not only the pleadings, but also depositions, affidavits, admissions, and other documentary evidence, MCR 2.116(G)(5), and must give the benefit of any reasonable doubt to the nonmoving party and must be liberal in finding a genuine issue of material fact. Summary disposition is appropriate only if the trial court is satisfied that it is impossible for the nonmoving party's claim to be supported at trial because of a deficiency that cannot be overcome. [*Zine v Chrysler Corp*, 236 Mich App 261, 270; 600 NW2d 384 (1999).]

"Where the moving party has produced evidence in support of the motion, the opposing party bears the burden of producing evidence to establish that a genuine question of material fact exists." *Nesbitt v American Comm Mut Ins Co*, 236 Mich App 215, 220; 600 NW2d 427 (1999).

Johnson's Management Services Company, Inc. (JMS) was a licensed real estate broker of which plaintiff and defendants Johnson and Yeomans were shareholders. Plaintiff filed the present action alleging five separate claims. The allegation common to each claim is that Johnson and Yeomans represented to plaintiff that he would receive forty percent of the profits of JMS and, specifically, forty percent of the commission generated by JMS' sale of a Hampton Inn hotel.

Upon review of the evidence and testimony presented to the trial court,¹ we conclude that summary disposition was properly granted on the fraudulent misrepresentation, innocent misrepresentation and silent fraud claims. First, plaintiff unequivocally testified at his deposition that Yeomans made no incorrect statements or misrepresentations to him and, specifically, made no representations to him regarding the Hampton Inn. Thus, without question, Yeomans was entitled to summary disposition on these claims. Second, plaintiff failed to offer any evidence that Johnson made misrepresentations or that he relied on any representations. While the record supports the conclusion that plaintiff was offered the opportunity to become a forty percent owner of JMS and that, during general discussions, the Hampton Inn deal was mentioned as one of the deals "cooking," the record does not indicate that representations were made to plaintiff that he was to receive a certain percentage of the profits from the Hampton Inn deal. Plaintiff's testimony, and the reasonable inferences to be drawn from it, only indicate that, as a result of general discussions, plaintiff believed he could get in on the big deals that were "cooking," including the Hampton Inn deal that he believed was pending through JMS. Plaintiff's assumptions, opinions and conclusions about what he thought certain statements may mean are insufficient by themselves to defeat summary disposition. See *Altairi v Alhaj*, 235 Mich App 626, 628-629; 599 NW2d 537 (1999) (the nonmoving party must set forth specific facts showing the existence of a genuine issue of material fact and cannot rest on mere conjecture or speculation).

More importantly, however, even if we could find that a genuine issue of fact existed with regard to whether there were misrepresentations about the Hampton Inn commission, nothing in the record supports an inference that plaintiff relied on any representations about the Hampton Inn when he associated with Johnson and Yeomans. Fraudulent misrepresentation, innocent misrepresentation, and silent fraud each require a showing that plaintiff detrimentally acted on material misrepresentations or on misimpressions given when proper disclosure was required but not made. *Novak v Nationwide Mutual Ins Co*, 235 Mich App 675, 688; 599 NW2d 546 (1999); *M & D, Inc v W B McConkey*,

¹ The parties attached selective pages of deposition testimony to their respective briefs on the issue of summary disposition below. Portions of deposition testimony that were not presented to the trial court for review when determining the issue of summary disposition are not considered by this Court on appeal. We rely only on the facts and information that were presented to the trial court prior to the grant of summary disposition. *Quinto v Cross & Peters Co*, 451 Mich 358, 367 n 5; 547 NW2d 314 (1996). Thus, to the extent the parties request on appeal that we consider portions of plaintiff's or defendant Johnson's depositions that were filed after the trial court ruled on defendants' motion for summary disposition and were not attached within the lower court record prior, the parties have impermissibly attempted to expand the record on appeal. See MCR 7.210(A); *Wiand v Wiand*, 178 Mich App 137, 143; 443 NW2d 464 (1989).

231 Mich App 22, 28-33; 585 NW2d 33 (1998). Plaintiff claims that the evidence shows he closed a profitable business to work with Johnson and Yeomans. It does not. Nothing in the record indicates plaintiff had a profitable or successful business or that he closed that business to work with Johnson and Yeomans because of representations made about the Hampton Inn commission. Indeed, the evidence in the trial court record does not even support an inference that the Hampton Inn commission caused plaintiff to join in business with Johnson and Yeomans. For that reason, there is no genuine issue of material fact as to any of the fraud claims.

Similarly, plaintiff's promissory estoppel claim was properly dismissed.

The elements of promissory estoppel are (1) a promise, (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee, and (3) that in fact produced reliance or forbearance of that nature in circumstances such that the promise must be enforced if injustice is to be avoided. In determining whether a requisite promise existed, we are to objectively examine the words and actions surrounding the transaction in question as well as the nature of the relationship between the parties and the circumstances surrounding their actions. We are to exercise caution in evaluating an estoppel claim and should apply the doctrine only where the facts are unquestionable and the wrong to be prevented undoubted. [*Novak, supra* at 686-687 (citations omitted).]

A promissory estoppel claim must be based on "an actual, clear, and definite promise." *Ypsilanti Twp v General Motors Corp*, 201 Mich App 128, 134; 506 NW2d 556 (1993). "If the expression is made in the course of preliminary negotiations when material terms of the agreement are lacking, the degree of certainty necessary in a promise is absent." *State Bank of Standish v Curry*, 442 Mich 76, 86; 500 NW2d 104 (1993). A promise is not a statement of opinion, a prediction of future events, or an indication of a party's will, wish or desire. *Id.* at 86, 89.

In this case, plaintiff testified that he could not recall specific words or meetings. He relied on the fact that Johnson indicated plaintiff was going to be part of a company, which had several large dealings, one of which was with the Hampton Inn. Plaintiff never articulated that a specific promise was made indicating he would receive any percentage of the commission from the sale of the Hampton Inn. Plaintiff failed to offer evidence that there was a specific, actual or definite promise in this case. Thus, his claim of promissory estoppel fails as a matter of law.

Finally, plaintiff's cause of action for breach of fiduciary duty was also properly dismissed. Plaintiff failed to offer sufficient evidence to create a question of fact as to whether a fiduciary relationship existed between Johnson, Yeomans and himself at the time the commission was received. Even if, however, plaintiff had offered sufficient evidence of a fiduciary relationship, the claim is barred by the statute of limitations. An action for breach of fiduciary duty is subject to a three-year period of limitations. MCL 450.1541a; MSA 21.200(541a); *Baks v Moroun*, 227 Mich App 472, 485-486; 576 NW2d 413 (1998). Plaintiff admitted that he knew that the Hampton Inn sale was consummated and the commission paid in June 1994. Plaintiff filed suit on November 19, 1997. Therefore, the breach of fiduciary claim was not timely filed.

In conclusion, summary disposition was properly granted on all of plaintiff's claims. Therefore, we need not consider defendants' alternate arguments in support of summary disposition, which were raised in defendants' cross appeal.

Affirmed.

/s/ Michael R. Smolenski

/s/ Brian K. Zahra

/s/ Jeffrey G. Collins